In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1018

JOHN DAVID NORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After waiving jury trial in the United States District Court for the Central District of California, petitioner was convicted on ten counts of mailing obscene materials in violation of 18 U.S.C. 1461. He was sentenced to concurrent prison terms of fifteen months subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed without opinion (Pet. App. B).

It is undisputed that the mailings for which petitioner was convicted were commercial rather than

private in nature. It was stipulated that five of the mailings were in response to solicitations in writing by postal inspectors or police acting under assumed names; the other five involved unsolicited mailings of advertisements for the materials ultimately purchased.

Petitioner contends that *Stanley* v. *Georgia*, 394 U.S. 557, and other decisions prohibit his prosecution and render 18 U.S.C. 1461 unconstitutional. The question whether *Stanley* or other intervening decisions have undermined *Roth* v. *United States*, 354 U.S. 476, sustaining a similar conviction under the same statute, is presently before the Court in *United States* v. *Reidel*, No. 534, this Term, probable jurisdiction noted, October 12, 1970. That case, however, involved only solicited mailings, in which the purchaser asserted himself to be an adult. As to half the counts here, on the other hand, neither apparent consent nor apparent majority was present. While the government argues in *Reidel* that the presence of such factors is not sufficient to shield commercial mailings from criminal sanction, the reasoning of the cases purporting to follow *Stanley* has consistently depended upon them. Thus, in *United States* v. *Lethe*, 312 F. Supp. 421 (E.D. Cal.), on which petitioner relies, the district court distinguished and sustained counts of the indictment relating to unsolicited mailings, as untouched by even the extended view of *Stanley*. *Id.* at 426. Half of the counts on which petitioner was convicted here are similarly unaffected.

In view of the five counts which may be affected by this Court's decision in *Reidel*, however, the Court may wish to defer disposition of the present petition until the final disposition of that case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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